ROGUE RIVER OUTFITTERS ASSOCIATION
DAVE HELFRICH RIVER OUTFITTERS, INC.

IBLA 81-623 Decided April 30, 1982

Appeal from decision of the Oregon State Office, Bureau of Land Management, denying a protest against the imposition of fees for commercial rafting trips on the Rogue River.

Affirmed.

1. Accounts: Fees and Commissions--Fees--Public Lands: Special Use Permits--Wild and Scenic Rivers Act

   The Bureau of Land Management may properly charge fees for special recreation permits authorizing commercial rafting on the Rogue River, a designated wild and scenic river, under sec. 4(c) of the Land and Water Conservation Fund Act, 16 U.S.C. § 460l-6a(c), and Departmental regulations at 43 CFR Part 8372.

2. Accounts: Fees and Commissions--Fees--Public Lands: Special Use Permits

   Where, on appeal, commercial outfitters protesting the imposition and increase of special recreation permit fees for commercial raft trips on the Rogue River, fail to demonstrate that the Bureau of Land Management's actions did not comport with its regulations or that the new fee levels have no reasonable basis under the regulations, a decision denying the protest will be affirmed.

3. Accounts: Fees and Commissions--Fees--Public Lands: Special Use Permits--Wild and Scenic Rivers Act

   Departmental regulations at 43 CFR Subpart 8372 require that, when the Bureau of Land Management issues special recreation permits authorizing use of special

> areas such as a designated wild and scenic river, fees must be charged for noncommercial as well as commercial users engaging in the same activity, except to the extent that a user is exempted from paying fees by 43 CFR 8372.4(d).

APPEARANCES: David L. Jensen, Esq., Eugene, Oregon, for appellants; Donald P. Lawton, Esq., Office of the Regional Solicitor, Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE PARRETTE

Rogue River Outfitters Association (Rogue) and Dave Helfrich River Outfitters, Inc. (Helfrich), appeal from a decision of the Oregon State Office, Bureau of Land Management (BLM), denying their protest against the imposition of fees for commercial use of the Rogue River for raft trips generally and against the imposition of increased commercial use fees for raft trips during the 1981 Rogue River commercial season specifically.

On November 5, 1980, BLM issued Instruction Memorandum No. OR 81-59 which approved a use fee for commercial raft and camping trips on the Rogue River for 1981 of $50 per 100 service days, an increase from the previous minimum charge of $25 per 100 service days. These raft and camping trips involve use of the river for rafting and use of Federal lands as campsites. BLM also initiated a use fee of $25 per 100 service days for commercial lodge trips, which had not previously been subject to fees. Lodge trips involve the use of the river for rafting, but lodging is provided in private lodges instead of on Federally-owned campsites.

BLM received a letter from Rogue and Helfrich dated April 7, 1981, challenging the imposition by BLM of any commercial use fees for raft trips on the Rogue River generally and the imposition of the increased use fees for the 1981 Rogue River commercial season specifically, and requesting that BLM consider the letter as an appeal of those actions. BLM, in a decision dated April 16, 1981, treated Rogue's appeal as a protest and denied it, holding that the initiation of a commercial use fee for lodge trips was based upon BLM-Forest Service recognition that the adjoining lands and the water surface are both subject to Federal administration, and upon a joint determination that a lesser fee should be charged for lodge trips, since they involved less use of Federal lands. BLM observed that the requirement for commercial use fees is set forth at 43 CFR Part 8370, that previous Rogue River fees were set at the minimum level under the regulations, and that Rogue River fees are comparable to fees required on similar rivers. Rogue and Helfrich appealed to this Board.

In their statement of reasons, appellants make three arguments:

1. Congress has not delegated to BLM authority to establish a user fee.

2. It is improper for BLM to charge a fee only to commercial users and not to noncommercial users.

3. BLM may not charge a user fee for the use of the private lodges.

In response BLM urges that it does have the authority to impose the challenged fees under the Wild and Scenic Rivers Act (WSRA), 16 U.S.C. §§ 1271-1287 (1976), section 304 of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1734 (1976), and the Departmental regulations at 43 CFR Part 8370. BLM suggests that the collection of fees from noncommercial users would be uneconomical and inconsistent with section 4 of the Land and Water Conservation Fund Act (LWCFA), 16 U.S.C. § 4601-6a (1976, Supp. IV 1980). Finally, BLM contends that it is not charging for the use of private property but rather for the use of the water surface, incidental use of adjacent Federal lands, and services provided by the Federal Government in establishing fees for commercial lodge/raft trips.

The portion of the Rogue River involved in this case was one of the original components of the Wild and Scenic Rivers System. Section 3 of the WSRA, 16 U.S.C. § 1274 (1976), as it specifically pertains to the Rogue River, reads:

> (a) The following rivers and the land adjacent thereto are hereby designated components of the national wild and scenic rivers system:
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> * * * * * * *
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> (5) Rogue, Oregon. -- The segment of the river extending from the mouth of the Applegate River downstream to the Lobster Creek Bridge; to be administered by agencies of the Departments of the Interior or Agriculture as agreed upon by the Secretaries of said Departments or as directed by the President.

On July 7, 1972, BLM and the Forest Service announced a joint plan for the development and management of the river. 37 FR 13407-416 (July 7, 1972). This plan provides the framework for administering the wild and scenic section of the Rogue River consistent with section 10(a) of the WSRA, 16 U.S.C. § 1281(a) (1976), which states:

> (a) Each component of the national wild and scenic rivers system shall be administered in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values. In such administration primary emphasis shall be given to protecting its esthetic, scenic, historic, archeologic, and scientific features. Management plans for any such component may establish varying degrees of intensity for its protection and development, based on the special attributes of the area.

Under the plan, BLM now administers the upper 47 miles of the river, and the Forest Service administers the lower 37 miles. 1/ The management plan

1/ The Rogue River was also designated an Oregon Scenic Waterway by the State of Oregon. On June 2, 1977, BLM, Forest Service, and the State of Oregon signed a memorandum of understanding providing for cooperative management of the Rogue River and its adjacent lands within the corridor that has been designated as an Oregon Scenic Waterway and as a national Wild and Scenic River.

identified boating activities, including commercial rafting, as a prime use of the river and recognized that regulatory control of boating would be necessary in the future to prevent safety hazards and a lowering of the quality of the recreational experience on the river. 37 FR 13411-412 (July 7, 1972). At the time the plan was agreed to, commercially guided raft trips were carrying groups of 50 or more persons, and some of these groups needed large campsites for overnight stops. The plan provides that the numbers of recreationists using the river area at any given time will be limited to levels consistent with the wild river management objectives.

In 1973, BLM and the Forest Service jointly issued a notice closing the river to all outfitters and guides engaged in commercial river float trips except for those who obtained a current letter of authorization and complied with its provisions. 38 FR 34901 (Dec. 20, 1973). Under the authorization, outfitters who arranged two or more trips on the river in 1973 would be allowed to continue the same level of use, except that the maximum party size would be limited to 25 persons unless otherwise authorized, and no more than two trips could be scheduled per week. Id. For the 1975 through 1978 seasons of use, joint notices establishing recreational use controls were published requiring outfitters to obtain a recreation use permit. The notices retained the restrictions on party size and numbers of trips per week. 39 FR 41869 (Dec. 3, 1974); 41 FR 24614 (June 17, 1976); 42 FR 22937 (May 5, 1977); 43 FR 12091 (Mar. 23, 1978). In 1976, noncommercial parties were required to register and obtain a permit to use the river. Party size was limited, but the number of groups was not. Beginning with the 1978 season, BLM and Forest Service imposed a use restriction of approximately 120 persons per day, divided equally between commercial and noncommercial users, and required noncommercial users to apply for a special recreation permit in advance. The 1978 notice remains in effect until revoked. 43 FR 12093 (Mar. 23, 1978).

The record contains no information on when BLM and the Forest Service began collecting fees for commercial uses of the Rogue River. Instruction Memorandum No. OR-80-157, dated January 3, 1980, on the subject of increasing the fees, begins with the statement, "The required commercial river use fee of $25.00 per 100 service days on the Rogue * * * has been in effect for the past several years," followed by a comment that this charge was considered the minimum fee under 43 CFR 8372.4. A letter dated May 6, 1980, from the Forest Service Region 6 office in Portland, Oregon, to BLM indicates that it had charged a minimum rate of $25 per 100 service days "for outfitter and guide services (which include our commercial river use)" for the past 15 years.

The 1973 closure notice and subsequent recreation use control notices did not specifically address the payment of fees. The initial notices did, however, incorporate indirectly the Department of the Interior regulations governing recreation fees set forth in 43 CFR Part 18 (1973-75) and promulgated pursuant to the authority of the LWCFA 2/ and, from 1977 on, the notices refer directly to section 4 of the LWCFA and to FLPMA, as well as to 43 CFR Part 18.

2/ The earlier notices referred to 43 CFR Group 6000-Outdoor Recreation, Generally. 43 CFR 6000.0-6(d) (1975) stated: "Reasonable fees in accordance with Part 18 of this title may be established and collected by the authorized officer."

Section 4 of the LWCFA, 43 U.S.C. § 4601-6a (1976), constitutes the underlying statutory authority for the special recreation permit fees at issue in this appeal. In order to understand the basis for these fees it is useful to examine the development of this authority to charge recreation use fees.

As originally enacted, the LWCFA authorized certain agencies of the Federal Government to collect two types of fees: Entrance or admission fees, and recreation user fees for use of sites, facilities, equipment, and services provided by the United States. See section 2, LWCFA, 78 Stat. 897. Departmental regulations reflected the statute with respect to the two types of fees. See 43 CFR Part 18 (1972).

In 1972, LWCFA was amended to revise the authority for fee collection. See P.L. 92-347, 86 Stat. 459. The new section 4 of LWCFA authorized certain admission fees and special recreation use fees. Section 4(b) limited the fees to instances where the Federal Government was providing specialized sites, facilities, equipment, and services, and provided (1) the basis for determining daily use fees for overnight occupancy in areas specially developed for such use and (2) for special recreation permits at fees established by the administering agency "for uses such as group activities, recreation events, motorized recreation vehicles, and other specialized uses." 3/ 86 Stat. 460. The regulations in 43 CFR Part 18 (1973) were modified to incorporate this amendment. 4/

In 1973, Congress amended section 4(b) to define more strictly what specialized facilities and services were subject to fees, by prohibiting

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3/ The language of section 4(b)(2) first appeared in the Senate version of this legislation. Conference Report No. 1164, 92nd Cong., 2nd Sess., [1972] U.S. Code Cong. & Ad. News 2843, 2845. It appears to have originated in a report and recommendation of the Department of the Interior. See Letter and Report from Rogers C. B. Morton, Secretary of the Interior, dated Mar. 12, 1971, [1972] U.S. Code Cong. & Ad. News 2832, 2839. The conference report for P.L. 92-347 stated that no recreation use fees would be collected for the use of facilities which virtually all visitors might reasonably be expected to use such as roads, trails, overlooks, visitor centers, wayside exhibits or picnic areas, and then commented on section 4(b)(2) as follows:

"To satisfy the need for special permits, covering special circumstances, the language contained in the Senate-approved bill has been incorporated into the Conference Committee recommendation. Under this provision, special permits may be issued at reasonable rates for the use of group campsites, special events, or for the use of off-road and other recreational vehicles." [1972] U.S. Code Cong. & Ad. News at 2845.

4/ Subsection (e) of section 4 of LWCFA provides that "the heads of appropriate departments and agencies may prescribe rules and regulations for areas under their administration for the collection of any fee established pursuant to this section."

the charging of a use fee for facilities which virtually all recreational visitors might be expected to use. P.L. 93-81, 87 Stat. 178. 5/

The strict limitations on use fees imposed by the 1973 amendment resulted in the virtual elimination of camping charges at all National Park areas, and most Forest Service areas and a corresponding loss in revenues dedicated to outdoor recreation purposes. 6/ H.R. Rep. No. 1076, 93rd Cong., 2nd Sess., reprinted in [1974], U.S. Code Cong. & Ad. News 3257, 3258. Consequently, in 1974, Congress again revised section 4 with the passage of P.L. 93-303, 88 Stat. 192, setting up the present fee collection scheme. See 16 U.S.C. § 4601-6a (1976), Supp. IV 1980). The revision recaptioned section 4 to read: "Admission and Use Fees; Establishment and Regulations." In addition, it did the following: (1) Continued (with modifications) the authority to collect certain admission fees (section 4(a)); (2) detailed the basis for the collection of daily recreation use fees for specialized outdoor recreation sites, facilities, equipment, or services provided at Federal expense, by listing specifically those facilities for which fees may not be charged and eliminating the standard imposed by P.L. 93-81 that there be no charge for facilities which "virtually all visitors might reasonably be expected to utilize" (section 4(b)); and (3) redesignated section 4(b)(2) as a new paragraph (c) providing authority for special recreation permits

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5/ Section 4(b) was amended to begin:

"(b) Special Recreation Use Fees. -- Each Federal agency developing, administering, or providing specialized sites, facilities, equipment, or services related to outdoor recreation shall provide for the collection of special recreation use fees for the use of sites, facilities, equipment, or services furnished at Federal expense: Provided, That in no event shall there be a charge for the day use or recreational use of those facilities or combination of those facilities or areas which virtually all visitors might reasonably be expected to utilize, such as, but not limited to, picnic areas, boat ramps where no mechanical or hydraulic equipment is provided, drinking water, wayside exhibits, roads, trails, overlook sites, visitors' centers, scenic drives, and toilet facilities. No fee may be charged for access to or use of any campground not having the following -- flush restrooms, showers reasonably available, access and circulatory roads, sanitary disposal stations reasonably available, visitor protection control, designated tent or trailer spaces, refuse containers and potable water."
87 Stat. 178.

6/ Pursuant to section 4(f) of LWCFA, 16 U.S.C. § 4601-6a(f) (1976), all recreation fees collected by any Federal agency under the authority of section 4 are put in a special account in the U.S. Treasury to be administered in conjunction with, but separate from, the revenues in the Land and Water Conservation Fund. Revenues in the special account are available for appropriation, without prejudice to appropriations from other sources for the same purposes, for any authorized outdoor recreation function of the agency that collected the fees.

for uses such as group activities, recreation events, motorized recreation vehicles and other specialized recreation use for which fees may be charged. 7/

The Department's regulations were again revised to reflect these changes. See 43 CFR Part 18 (1974). The revised regulations recognized three types of Federal recreation fees: Entrance fees, daily recreation use fees, and special recreation permit fees. 43 CFR 18.2 (1974). 8/ The notice

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7/ The revised section 4 reads in part:

"(b) Recreation use fees; collection; * * *

"Each Federal agency developing, administering, providing or furnishing at Federal expense, specialized outdoor recreation sites, facilities, equipment, or services shall, in accordance with this subsection and subsection (d) of this section, provide for the collection of daily recreation use fees at the place of use or any reasonably convenient location: Provided, That in no event shall there be a charge by any such agency for the use, either singly or in any combination, of drinking water, wayside exhibits, roads, overlook sites, visitors' centers, scenic drives, toilet facilities, picnic tables, or boat ramps: Provided, however, That a fee shall be charged for boat launching facilities only where specialized facilities or services such as mechanical or hydraulic boat lifts or facilities are provided: And provided further, That in no event shall there be a charge for the use of any campground not having the following -- tent or trailer spaces, drinking water, access road, refuse containers, toilet facilities, personal collection of the fee by an employee or agent of the Federal agency operating the facility, reasonable visitor protection, and simple devices for containing a campfire (where campfires are permitted). * * *

"(c) Special recreation permits.

"Special recreation permits for uses such as group activities, recreation events, motorized recreation vehicles, and other specialized recreation uses may be issued in accordance with procedures and at fees established by the agency involved."

16 U.S.C. § 4601-6a(b) and (c) (Supp. IV 1974). While the House Committee report on this bill elaborated on the recreation use fees authorized by paragraph (b) and the limitations thereon, it did not comment on the language of paragraph (c). See H.R. Rep. No. 1076, 93rd Cong., 2nd Sess., [1974] U.S. Code Cong. & Ad. News 3257-62. However, in response to the committee's request for views on the bill, the Secretary of the Interior commented that it

"clarifies the status of fees charged under section 4(b)(2), which authorizes issuance of special recreation permits for uses such as group activities, recreation events, motorized recreation vehicles, and other specialized recreation uses. The bill would make it clear that these are a separate category of fees which, unlike special recreation use fees, may be charged even in the absence of specialized facilities, sites, equipment, or services."

[1974] U.S. Code Cong. & Ad. News at 3263.

8/ These regulations were initially promulgated as 43 CFR Part 18, 39 FR 33217 (Sept. 16, 1974). They were redesignated in 1979 as 36 CFR Part 1227, 44 FR 7143 (Feb. 6, 1979); in July 1981 as 36 CFR Part 66, 46 FR 34329 (July 1, 1981); and again in August 1981 as 36 CFR Part 71, 46 FR 43045 (Aug. 26, 1981). The July 1981 redesignation is contained in the 1981 edition of the Code of Federal Regulations; the August 1981 redesignation is not. Subsequent citations will be to 36 CFR Part 66.

making the revisions commented particularly on the "creation of a separate category of fees for special recreation permits." 39 FR 33217 (Sept. 16, 1974).

The BLM decision at issue cites 43 CFR Part 8370 -- Use Authorizations, and specifically the regulations in 43 CFR Subpart 8372 -- Special Recreation Permits Other Than on Developed Recreation Sites, as its direct authority for imposing fees on commercial rafting operations on the Rogue River. The preamble to these regulations when they were proposed in 1977 provides justification for them as follows:

> For many years, recreational uses of the public lands, not specifically provided for by existing law, were authorized by special land-use permits issued in accordance with regulations in 43 CFR Part 2920. Pub. L. 93-303, amending the Land and Water Conservation Fund Act of 1965, and the Federal Land Policy and Management Act of 1976 (Pub. L. 94-579), authorized recreational uses of the public lands under permit. Because these recreational uses are now authorized by law, special land-use permits are no longer appropriate for permitting such use, and a new permit system is necessary. Special recreation permits for recreational use at other than developed recreation sites shall generally not be required of individuals or families not making competitive and/or commercial use of the public land.
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> The purpose of the proposed rulemaking is to continue to allow recreational use of the national resource lands and to ensure a safe and enjoyable recreational experience for users while minimizing the environmental impact of their recreational use. This will be accomplished by a fair and equitable system of special recreation permits for recreational use of areas requiring management of such use needed to ensure a safe recreational experience for the user and to protect natural values.
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> This rulemaking would provide for issuance of permits and collection of fees for permits under authority contained in Pub. L. 93-303. These regulations would serve to implement the enforcement authority provided in the Federal Land Policy and Management Act of 1976 and the Land and Water Conservation Fund Act of 1965, as amended by Pub. L. 92-347, and 93-303, and on those areas covered by joint agreements between the Bureau of Land Management and State governments as provided for in Title II of the Sikes Act, as amended by Pub. L. 93-452. With exceptions provided by law, the enforcement provisions of the Federal Land Policy and Management Act of 1976 and the Land and Water Conservation Fund Act of 1965, as amended, will apply to all special recreation permits issued for which a fee is charged.
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> Another purpose is to provide for certain controls necessary in the management of special areas such as trails in the National Trails System and river areas in the National Wild and Scenic Rivers System.

> Four categories of permit are recognized: (a) commercial, (b) competitive, (c) motorized recreation vehicle, and (d) special areas. Fees generally will be charged for permits for these four categories of use. The basis for fees shall include, but not be limited to, resource impacts of permitted use, administrative costs, levels of supervision necessary, and comparability with fees charged by other Federal and non-Federal agencies. Fees collected will be used for recreational purposes as provided in the Land and Water Conservation Fund Act of 1965, as amended.

42 FR 5294 (Jan. 27, 1977).

Following public comment, those regulations were published in final as 43 CFR Subpart 6263. 43 FR 7868 (Feb. 24, 1978). They were recodified into 43 CFR Subpart 8372, 43 FR 40734 (Sept. 12, 1978). The Department stated at the time of initial codification:

> A permit system is considered necessary to establish management and control over concentrated recreation activities which cause damage to natural resources. Fees are included for two purposes. Filing fees are to cover the cost of processing an application and are nonrefundable because an application must be processed and costs are involved whether it leads to a permit or is rejected. Use fees are charged to ensure the general public a fair return for the use of its land for commercial purposes and for specialized uses which entail exclusive use of certain public lands by a specific person, group or association.

43 FR 7868 (Feb. 24, 1978).

Examination of the regulations in 43 CFR Part 8370 reveals that, in promulgating these regulations establishing its permit system, BLM preserved the distinction, found in section 4 of LWCFA and in the Department's recreation fee regulations at 43 CFR Part 66, between recreation use fees for specially developed facilities and special recreation permit fees for specialized uses. In contrast to 43 CFR Subpart 8372 concerning "Special Recreation Permits Other Than on Developed Recreation Sites," Subpart 8371 is reserved for regulations governing "Recreation Use Permits, Developed Sites." We therefore find that the requirements of 43 CFR Subpart 8372 are fully supported by the authority contained in section 4(c) of LWCFA.

Neither the BLM regulations at 43 CFR Subpart 8372 nor the Department's regulations at 36 CFR Part 66 directly define the terms that describe the uses for which special recreation permit fees may be collected. The Department's recreation use regulations reiterate generally the language in section 4(c), LWCFA (see 36 CFR 66.2(c), 66.3(c)), but also provide criteria that must be satisfied before such permits are required (see 36 CFR 66.10(b)). The latter criteria are dictated by section 4(d) of LWCFA, 16 U.S.C. § 460l-6a(d) (1976).

In determining whether BLM was justified in requiring the special recreation permits and fees at issue, we again note the bases on which the joint Rogue River management plan projected the need to regulate boating activities on the Rogue River -- namely, to prevent safety hazards and a lowering of the

quality of the recreational experience on the river -- and compare them with the criteria established for the issuance of special recreation permits. The criteria listed in 36 CFR 66.10(a) are:

> (1) The use complies with pertinent State and Federal laws and regulations on public health, safety, air quality, and water quality;
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> (2) The use will not adversely impact archeological historic or primitive values and is not in conflict with existing resource management programs and objectives;
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> (3) The necessary clean-up and restoration is made for any damage to resources or facilities; and
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> (4) The use is restricted, to the extent practicable, to an area where minimal impact is imposed on the environmental, cultural or natural resource values.

We conclude that the justification for controlling boating activity on the Rogue River, whether viewed as a group activity, or as the use of a motorized recreational vehicle, or as other specialized recreation use, is consistent with the criteria in 36 CFR 66.10(a) and thus conclude that commercial rafting trips fall within the uses for which special recreation permits at established fees may be required under section 4(c) of LWCFA and 36 CFR Part 66.

The BLM regulations require special recreation permits for "(a) commercial use, (b) competitive use, (c) off-road vehicle events involving 50 or more vehicles; and (d) special area use where the authorized officer determines the criteria of the Land and Water Conservation Fund Act, as amended, * * * the Wild and Scenic Rivers Act, Federal Land Policy and Management Act, * * * require their issuance." 43 CFR 8372.1-1. In addition to being a special area use, the commercial rafting trips at issue clearly fall within BLM's definition of commercial use. See 43 CFR 8372.0-5(a). The fees for such permits are specified in 43 CFR 8372.4 and include both a filing fee and a use fee based on the amount of actual use.

[1] In view of the foregoing, we must conclude first that there are statutory bases for the imposition of use fees in connection with special recreation permits, and that the Department has promulgated regulations in accordance with that authority. Such regulations, therefore, have the force and effect of law. See General Services Administration v. Benson, 415 F.2d 878 (9th Cir. 1969); Arizona Public Service Co., 20 IBLA 120 (1975). Second, we find that BLM has acted pursuant to those regulations in imposing fees for commercial rafting use of the Rogue River. We must affirm the BLM decision to the extent it denied the protest against imposition of such charges generally. To do otherwise would be to ignore the duly promulgated regulations which we are bound to follow. See Vitarelli v. Seaton, 359 U.S. 535 (1959); McKay v. Walhenmaier, 226 F.2d 35 (D.C. Cir. 1965).

We find also that in addition to the specific authority provided by section 4 of LWCFA, BLM also has general authority to impose fees under section 304 of FLPMA, 43 U.S.C. § 1734 (1976), which states:

> (a) Notwithstanding any other provision of law, the Secretary may establish reasonable filing and service fees and reasonable charges, and commissions with respect to applications and other documents relating to the public lands and may change and abolish such fees, charges, and commissions.
>
> (b) The Secretary is authorized to require a deposit of any payments intended to reimburse the United States for reasonable costs with respect to applications and other documents relating to such lands. * * *
>
> (c) In any case where it shall appear to the satisfaction of the Secretary that any person has made a payment under any statute relating to the sale, lease, use, or other disposition of public lands which is not required or is in excess of the amount required by applicable law and the regulations issued by the Secretary, the Secretary, upon application or otherwise, may cause a refund to be made from applicable funds. [Emphasis added.]

To the extent that appellants argue that section 304(a) does not permit use fees, we respond that section 304(c) when read in connection with section 4 of LWCFA recognizes that use fees may be imposed in some circumstances.

[2] The next question presented is whether appellants' protest against the increased fees for the 1981 Rogue River commercial season was properly denied by BLM. We find that it was. The regulation governing fees, 43 CFR 8372.4, provides:

> (b) Use fees. (1) Commercial use -- a minimum of $25 is required for use if not in excess of 100 user days. Payment for use in excess of 100 user days shall be in the amount of $25 each additional 100 user days or fraction thereof.
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> * * * * * * *
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> (5) The authorized officer may charge larger fees than these minimums consistent with charges made for similar uses by other organizations and governmental agencies in the region of use.
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> (6) Any change in established fees will be made in accordance with section 304 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1734).

The general criteria set forth in 43 U.S.C. § 1734(c) (1976) for determining reasonable costs on which fees are based include:

> [A]ctual costs (exclusive of management overhead), the monetary value of the rights or privileges sought by the applicant, the

> efficiency to the government processing involved, that portion of the cost incurred for the benefit of the general public interest rather than for the exclusive benefit of the applicant, the public service provided, and other factors relevant to determining the reasonableness of the costs.

With respect to fees for special recreation permits under LWCFA, BLM must also be governed by terms of section 4(d) of the LWCFA:

> All fees established pursuant to this section shall be fair and equitable, taking into consideration the direct and indirect cost to the Government, the benefits to the recipient, the public policy or interest served, the comparable recreation fees charged by non-Federal public agencies, the economic and administrative feasibility of fee collection and other pertinent factors.

See also 36 CFR 66.10(b).

The record reveals that BLM was guided by these criteria in its reevaluation of the fees charged to commercial rafting outfitters. BLM surveyed fees charged by other Federal agencies and the State for similar activities on other Oregon rivers, as well as fees charged in nearby states for such activities. Various methods for calculating fees were reviewed. District managers were instructed to consider the reasonable costs of permit issuance, environmental assessment, and permit monitoring for compliance. Instruction Memoranda Nos. OR 80-157 and OR-81-10. BLM's initial letter to appellants indicates that BLM and Forest Service studied the fees and found that they were relatively low on the Rogue River, especially in comparison with the services provided, such as toilets and maintenance. Counsel for BLM cites the cost to the Government of maintaining toilets and collecting refuse along the river as supporting the increased charges in order to preserve the wild and scenic quality of the river (Answer at 6). 9/

9/ At first glance, charges related to undeveloped campsites and toilets would appear to be prohibited by section 4(b) of LWCFA. However, those limitations apply to daily recreation use fees as distinct from the fees associated with special recreation permits for specialized use of a recreation area.

In the case of a "special area" such as a wild and scenic river whereby specific designation Congress has determined that its unique wild and scenic characteristics must be preserved, the provision of toilet facilities and refuse collection at campsites in places accessible to groups rafting the river constitute a specialized service designed to preserve unique resource values of the river, the cost of which may be taken into account when the permit fee is calculated. The participants here are not charged for each individual use of the toilets or campsites; but rather for the impact their specialized use, a rafting trip over a period of days, makes on the wild and scenic river area. We note that consistent with the Rogue River management plan and the criteria in 36 CFR 66.10(a)(3), BLM alternatively could have required that groups rafting on the Rogue collect and carry out all human waste and refuse, at cost to the user, with loss of permit privileges the consequence of failure to comply in order the preserve the special character of the wild and scenic river. See Prohibited Acts in Rogue National Wild and Scenic River Area, 46 FR 29991, 29992 (June 4, 1981).

Appellant suggests that section 304 of FLPMA only authorizes "service" fees and not "use" fees such as the one at issue, which is based on the amount of use involved. But we concluded that what a fee is called is not controlling here since the level of service provided to each user, be it safety monitoring or refuse collection, clearly depends on the amount of "use," i.e., the number of days, for which the service is provided. Appellants have failed to show error in the BLM determination that resulted in the increased fees.

In support of their argument that BLM may not charge a use fee for commercial raft trips involving overnight stays in private lodges, appellants urge that such a fee constitutes a charge for the private use of private property. We disagree. The only identified difference in commercial rafting use of the Rogue River by camping trips and by lodge trips is that on camping trips the participants spend the night in Federal campgrounds, and on lodge trips they do so in private lodges. The conclusion which may logically be drawn is that while the impact of a lodge trip on the BLM-managed portions of the Rogue River may be less than that of a camping trip, the impact is not as appellants appear to argue, eliminated. During daylight hours, lodge trip participants use the river and adjacent Federal lands to the same degree as camping trip participants. Thus, for lodge trips BLM incurs the same costs with respect to processing permits, monitoring the rafting activity on the river, and policing the areas of the public lands used, as it does for camping trips. The lesser impact of lodge trips may, however, warrant a lesser fee than that imposed on camping trips. Appellants have not demonstrated any specific error in the $25 per 100 service days charge now being imposed by BLM.

[3] Finally, an issue was raised on appeal which was not presented in the protest and, therefore, not addressed by BLM in its decision on the protest. That issue is whether BLM may properly impose the fees involved in this case only on the commercial user.

As pointed out by counsel for BLM, "[s]pecial recreation permits are required for commercial uses and also for special area use where the BLM determines that the Wild and Scenic River Act requires their issuance. (43 CFR 8372.1-1.)" (Emphasis added.) 10/ The wild and scenic section of the Rogue River is a special area, and therefore, individuals, or individual immediate families, are not excepted by regulation from the requirement of having a special recreation permit. See 43 CFR 8372.1-2. The question, therefore, is whether these noncommercial users must be charged a fee. 43 CFR 8372.4(b)(3) provides:

10/ A "special area" is defined in the regulations as

"an area established as a component of the National Trails System, the National Wild and Scenic Rivers System, the National Wilderness System, an area covered by joint agreement between the Bureau of Land Management and a State government as provided for in title II of the Sikes Act, or any other area where the authorized officer determines that the resources require special management and control measures for their protection." 43 CFR 8372.0-5(g).

> (3) Special area use -- fees may be required for special area use by other than commercial, competitive and off-road vehicle users where the authorized officer determines that such charges are consistent with the Land and Water Conservation Fund Act. A minimum fee of $1 shall be charged for each permit for such use.

Counsel for BLM argues that BLM may not impose a fee on noncommercial users. He contends that it is uneconomical to collect fees from individual noncommercial users, and that it is inconsistent with the LWCFA. He states:

> In accordance with the requirements of [LWCFA, 16 U.S.C. § 460l-6a(b) (1976)] and the regulations implementing the act found in 36 CFR 1227.3 [1980], a charge cannot be made for special area use unless special facilities are provided. The toilet facilities, undeveloped camp sites, and boat launching facilities provided by the BLM and Forest Service do not qualify under the act for the collection of a fee from noncommercial users. Therefore, under the regulations of the BLM found in 43 CFR Part 8370, the BLM is not authorized to charge a use and service fee to such users even if it wished to do so.

(Answer at 9).

BLM has confused the prohibition in section 4(b) of LWCFA against collection of a recreational use fee, unless specialized facilities, equipment, or services are available, with the special recreation permit fees authorized by section 4(c) of LWCFA. Clearly, since specialized facilities, equipment, or services are not involved, recreation use fees would not be appropriate. However, the question remains whether special recreation permit fees must be charged noncommercial users. BLM's regulations specifically exempt certain individuals and groups from payment of such fees. 43 CFR 8372.4(d)(5) states: "(5) No fee shall be charged for those special recreation permits required for: (i) Any hospital patient actively involved in medical treatment or therapy in the area visited; (ii) educational and therapeutic institutions that are not commercial; and (iii) individuals, and individual immediate families except in certain special areas." (Emphasis added.) Therefore, the regulations themselves contemplate the collection of a fee for special recreation permits for individuals or individual families in "certain special areas." Collection of such a fee for special recreation permits is also consistent with the LWCFA, since that act authorizes special recreation permit fees for specialized uses, including those which are dependent upon such specialized areas.

Since the wild and scenic section of the Rogue River is a "certain special area," the regulations require that noncommercial users, with the above-noted exceptions, pay a minimum fee of $1 for each permit. See 43 CFR 8372.4(b)(3). We find BLM's argument, that to do so would be uneconomical, to be unfounded. As we previously pointed out, since 1976 noncommercial parties have been required to obtain a permit in order to raft on the Rogue River. Thus, a system for collecting such fee is already in place. Presumably BLM incurs similar costs for processing these permits as it does for commercial permits. Furthermore, since 1978, use of the Rogue River has been equally divided between commercial and noncommercial users. Thus, presumably the BLM activities required to monitor the river in order to protect the

quality of the recreational experience, apply equally to commercial and non-commercial users. Similarly, we find that half the need for the maintenance of toilet facilities and of trash collection is likely to result from noncommercial users. We can find no distinction between the specialized use of the commercial users and the specialized use of noncommercialized users which would permit noncommercial users to have free use of the Rogue River for rafting.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Oregon State Office is affirmed.

Bernard V. Parrette
Chief Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Edward W. Stuebing
Administrative Judge